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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF
THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015**

**Executive Summary of the Discussion of the Roundtable on Competitive Neutrality in
Competition Policy**

16-18 June 2015

Paris, France

*This Executive Summary by the OECD Secretariat contains the key findings from the discussion held under Item IX of the 123rd meeting of the Competition Committee on 15-19 June 2015.
More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.*

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**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF THE
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Executive Summary of the Discussion of the Roundtable on Competitive Neutrality in Competition Policy

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By the Secretariat¹

Considering the roundtable discussion, the delegates' written contributions and the Secretariat paper, the following key points emerge:

1. Competitive neutrality is important to effective competition policy and vice versa. As governments strengthening their competition laws and their enforcement actions against competition violations, it is essential that states themselves do not unduly distort or restrict the playing field.

Competitive neutrality can be defined as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government ownership or involvement in the marketplace does not confer an undue competitive advantage or disadvantage on any actual or potential market participant. Competitive neutrality matters both for its own good, as it generates important economic and political benefits, and because it contributes to effective competition. When this is impossible, governments should at least identify the costs of their interventions to enable informed policy choice. Competition policy and competitive neutrality are inter-dependent: (i) competitive neutrality is possible only if there is room for actual or potential competition in the first place; (ii) competitive neutrality ensures effective competition by maximising consumer welfare, economic efficiency, and innovation; and (iii) broad and neutral competition law enforcement plays in turn a major role in ensuring a level playing field.

There can, of course, be policy rationales for state intervention. Competitive neutrality policies ensure that governments assess whether their public policy objectives can be pursued without unnecessarily distorting markets. Governments may intervene in the market for various and legitimate reasons, such as correcting market failures, ensuring universal access to public goods and services, setting labour and environment standards, promoting R&D and education. Government may act in the market as a player (i.e. provider, competitor), as a customer (e.g. public procurement) and/or as a regulator (or de-regulator). Not every state measure affects markets or distorts competition. What matters for competitive neutrality is to identify whether the state measures affect the market or concern an economic activity in which private providers could compete; and among such measures, to identify the ones that distort competition favouring public over private activities. Where a distortion exists, i.e. where state measures confer a competitive edge, two questions are relevant: (i) is the distortion avoidable – in other words, can the policy objective be achieved through less distortionary means? (ii) If not, do the benefits of this policy which distorts competition outweigh its costs?

2. Some of the most common state measures or interventions which can distort competition in the market place include state ownership and control, subsidies and public services, regulation, and industrial policy and state intervention.

State ownership and control. There is no unanimous definition of what amounts to government control, which can take various forms. What matters to the competitive neutrality discussion is (i) whether one or more of the SOE's activities has an economic or commercial nature, (ii) if the SOE is present in a market where other economic actors do or could compete; and (iii) if the SOE might enjoy advantages vis-à-vis private competitors.

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

Addressing distortions due to state control is important as SOEs operate in a broad range of markets and represent a significant part of national economies. Calculating the net competitive edge or hardship borne by an SOE in relation to actual or potential competitors may be complex. The difficulty often stems from the hybrid nature of SOEs' activities. The OECD SOE Guidelines provide principles to improve the public and corporate governance of SOEs including: transparency, accountability and efficiency principles, separate accountancy for SOEs' economic and non-economic activities, and monitoring of the state and SOE impact on the market where it is active.

In some jurisdictions competitive neutrality concerns can arise also in relation to local state control or municipally-owned enterprises, which can perform public utility services but also act as market players. Immunities and advantages benefiting such local enterprises deter or distort competition.

Subsidies and public services. There is no exhaustive list of subsidisation forms. From a competitive neutrality perspective, two criteria are relevant: (i) if the subsidy is selective, i.e. favouring a specific economic actor as opposed to others; and (ii) if it emanates ultimately from the government, i.e. it is borne by state resources. The question is whether these subsidies are necessary and effective in achieving public policy objectives other than competition, and whether their distortionary effects on competition could be avoided or at least minimised.

In the context of public services, competitive neutrality challenges may arise at three levels: (i) the selection of the public service provider, (ii) the privileges and powers attached to the public service, and (iii) how it is compensated. Transparency, effectiveness and value-for-money principles are established in some jurisdictions; in others, subsidies remain unchecked and can prove distortionary on both domestic and international levels.

Regulation. Government regulation is designed to promote and protect important public policy objectives, including norms to ensure quality, access, environment, health and safety, or to foster innovation, entrepreneurship, labour and education. Regulation (and de-regulation) may also serve to create and stimulates markets in the first place (proactive regulation), or to address market distortions and failures (reactive regulation). In that sense, regulation plays a role in creating a competitive environment. Other regulatory interventions, conversely, may have distortionary effects and raise competitive neutrality concerns, such as: uneven liberalisation and sector (de)regulation, special professions entrusted with self-regulation powers, or licensing regimes un-levelling the playing field. Competitive neutrality concerns arise where these regulatory mechanisms prove unduly restrictive or discriminatory.

Industrial policy and state intervention. Industrial policy and state intervention constitutes a residuary category of distortions, generally favouring a specific industry or so-called national champion. It can take various forms, such as political involvement in strategic M&A, state shareholder's activism, and selective administrative hardship. Industrial policy and state intervention can lead to competitive neutrality distortions at two levels: at the level of the state measure and selection of the concerned market player (upstream), and at the level of this player's conduct on the market (downstream). Interventions protecting or promoting a so-called national industry or champion, as opposed to foreign players and investors, have further distortionary repercussions at international level (as to foreign companies' and foreign states' reactions). Challenges arise in identifying these distortions, absent satisfactory reporting and monitoring mechanisms.

3. Competition policy, law and enforcement contribute to enhancing competitive neutrality in the market place, but there are two limitations: not all distortions amount to competition law violations, and even when they do, involvement of the state represents a serious challenge to competition law enforcement.

Confronted with a potential competitive neutrality distortion, the fundamental question for competition authorities is whether the distortion likely amounts to a competition law infringement ("anticompetitive distortion"). If that's the case, the agency should decide what can be achieved through effective enforcement and what challenges arise in applying competition laws against state-induced violations. If the distortion does not amount to a competition law infringement, the agency should assess if it disposes of other legal mechanisms to restore competitive neutrality.

Competition authorities recognise that the application of competition law plays an important role in ensuring a level competitive field. To ensure competitive neutrality, jurisdictions should consider ownership- and nationality-neutral competition laws. Most jurisdictions in fact apply competition law widely, using a functional criterion (i.e. an economic or commercial activity) regardless of whether the activity or entity under scrutiny bears a government

mark. Yet, differences across jurisdictions arise with regard to exceptions and exemptions barring the enforcement of competition law to certain activities or sectors. Most jurisdictions apply a strict interpretation standard of exemptions and exclusions.

When competition authorities enforce competition laws against an SOE or another public entity performing an economic activity, there are a number of specific challenges that they face: (i) institutional and procedural challenges, due e.g. to state interference or competing regulatory and enforcement powers; and (ii) substantive challenges, because competition rules are essentially based on a corporate profit-maximising rationale, whereas state-owned or state-related market players may act anti-competitively regardless of any profit-making logic.

Many competitive neutrality issues do not qualify as infringements of the competition law. Various jurisdictions have therefore established additional rules under which competitive neutrality distortions may be caught and addressed. The table in the Annex summarises the most common tools used to address such distortions, although not all these instruments exist everywhere and they may not always be entrusted with the competition authority.

4. There is no single way in which jurisdictions adopt rules to ensure competitive neutrality and the institutional setting for enforcing such rules also varies depending on each jurisdiction. In some jurisdictions competitive neutrality rules are included in a comprehensive neutrality framework while in others competitive neutrality provisions are included in different legal instruments, possibly also in the competition law.

Competitive neutrality tools can be established either as part of an overall competitive neutrality framework (e.g. in Australia and the EU), or through specific provisions (e.g. Finland and Norway). Competitive neutrality principles are further enshrined in the constitution of various jurisdictions (e.g. Brazil, Chile, Mexico and the Russian Federation). The competition authorities have an important role in ensuring competitive neutrality but may not necessarily be the institution entrusted with the enforcement of the competitive neutrality rules.

While in most jurisdictions competition authorities have “soft” powers allowing them to recommend changes in regulatory framework or in legal provisions which may lead to a distortion of competitive neutrality, some jurisdictions have entrusted the competition authority with “hard” powers. These include, for example, the power to lodge actions in courts to remedy competitive neutrality distortions, e.g. to obtain an injunction against the government or to revise anticompetitive regulation.

Annex:**Competitive neutrality distortions & tools**

Distortive measures	Relevant rules
Competitive neutrality distortion (generally)	Competitive neutrality framework
Subsidisation (state aid)	Anti-subsidy and state aid control
Discriminatory selection of an entrusted player (special rights, public services)	Public procurement rules (open competitive process), PSC (public sector comparator) mechanism
Excessive or insufficient compensation of a public service	Public service compensation standards (cost and profit assessment)
Distortionary regulation	Regulatory impact assessment framework, including competition and competitive neutrality factors
Cross-subsidisation and hybrid companies	Good corporate governance rules
Conflicts of interests	Good public and corporate governance rules re: conflicts, independence and incompatibilities
Abuse of state power	Public laws against abuse of administrative powers
Discrimination and unfair treatment	Constitutional principles of equality, non-discrimination, fair competition